No. 74-1229

JUN 3 19

MICHAEL RODAK, JR.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

---

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
*Respondents.*

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

## REPLY OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.

---


*Of Counsel:*

F. MARK GARLINGHOUSE
195 Broadway
New York, New York 10007

CHARLES A. HORSKY
MICHAEL BOUDIN
E. EDWARD BRUCE
888 Sixteenth Street, N.W.
Washington, D. C. 20006

CHARLES RYAN
HAROLD S. LEVY
195 Broadway
New York, New York 10007

*Attorneys for Petitioners*


June 1975


PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

## TABLE OF CONTENTS


Page

REPLY ..... 1

I. This Case Warrants Plenary Review Because the Legal Issues Are Important and Recurring and There Are Conflicts Between the Decision Below and Decisions of this Court and Other Circuits ..... 1

II. The Evidentiary Hearing Issue Presents a Recurring Question of Administrative Law on Which the Circuits Are Divided ..... 3

III. The Lack of Fair Notice Raises a Basic Issue Respecting the Scope and Rationale of *Morgan* v. *United States*, 304 U.S. 1 (1938) ..... 9

IV. The Summary Tariff Rejection Conflicts with Decisions Both of This Court and of the Court of Appeals for the Fourth Circuit ..... 14

CONCLUSION ..... 19

---

APPENDIX ..... 1a


## TABLE OF AUTHORITIES


CASES:

*American Airlines, Inc.*, v. *CAB*, 359 F.2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966) ..... 7

*Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908) ..... 3, 14-18

*Cincinnati, N.O. & T.P. Ry.* v. *Chesapeake & O. Ry.*, 441 F.2d 483 (4th Cir. 1971) ..... 14, 16-18

*Cruces Cable Co.*, 35 F.C.C.2d 707 (1972), *reconsideration denied*, 39 F.C.C.2d 552 (1973) ..... 14, 15

*GTE Service Corp.* v. *FCC*, 474 F.2d 724 (2d Cir. 1973) 7

*SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943) ..... 5

Page

*Specialized Common Carrier Services*, 29 F.C.C.2d 870, *reconsideration denied*, 31 F.C.C.2d 1106 (1971), *aff'd sub nom. Washington Utils. & Transp. Comm'n* v. *FCC*, Nos. 71-2919 and 72-1198 (9th Cir. Jan. 20, 1975) ..... *passim*

*United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332 (1956) ..... 14, 18

*United States* v. *Florida East Coast Ry.*, 410 U.S. 224 (1973) ..... 2, 5, 6

STATUTES:

Administrative Procedure Act:
- Section 4(b), 5 U.S.C. § 553(c) ..... 6
- Section 7(c), 5 U.S.C. § 556(d) ..... 7

Communications Act of 1934:
- Section 201(a), 47 U.S.C. § 201(a) ..... 5
- Sections 201-05, 47 U.S.C. §§ 201-05 ..... 18
- Section 214(a), 47 U.S.C. § 214(a) ..... 17

MISCELLANEOUS:

49 C.F.R. § 1100.51 ..... 6

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1974

---

No. 74-1229

---

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,
*Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
*Respondents.*

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

## REPLY OF AMERICAN TELEPHONE AND TELEGRAPH COMPANY, et al.

---

This reply is submitted by petitioners AT&T *et al.* in response to the oppositions to certiorari filed by the respondents the FCC and the United States, MCI, Southern Pacific and Western Union.

### I. This Case Warrants Plenary Review Because the Legal Issues Are Important and Recurring and There Are Conflicts Between the Decision Below and Decisions of This Court and Other Circuits.

In responding to AT&T's certiorari petition, the Government and several respondents supporting its

opposition to certiorari make a melange of claims that are discussed in greater detail below. However, there are several basic considerations that deserve attention at the outset and confirm that the issues on their face are sufficiently grave, consequential and subject to conflicting precedent as to warrant plenary review by this Court.

First, it is clear that the FCC here ordered the Bell System to physically connect specialized carriers into the nationwide switched telephone network without ever accepting and evaluating *evidence* as to the operational and economic impact of this course in *any* type of proceeding. Such a procedure conflicts with principles recognized by other courts of appeals (AT&T Pet. 24-25) and is inconsistent with the FCC's own past practice under the governing statute. *Id.* at 21. The refusal to accept and consider facts is not justified by this Court's decision in *Florida East Coast Ry.* —where factual data was accepted by the ICC—even if the agency proceeding below in this case were (inaccurately) described as a rulemaking. See pp. 5-7, below.

Second, in taking this summary action requiring FX-CCSA physical connection the FCC relied heavily, although not exclusively, on its earlier *Specialized Carrier* decision. Yet, it is indisputable that neither in the notice commencing that earlier proceeding nor in the decision itself was there any specific mention of FX-CCSA physical connection or any discussion of the consequences of allowing specialized carriers to be connected directly into the switched network on which the public relies for its essential telephone services. The FCC's action in this case plainly raises a

substantial question under the fair-notice principle of *Morgan* v. *United States,* 304 U.S. 1 (1938).

Third, there is no dispute that two lines of Supreme Court precedent exist, one under the Interstate Commerce Act and one under the Natural Gas Act, which reach different results on the important question whether a tariff change overrides a pre-existing, inconsistent contract. Under the Interstate Commerce Act, on which the Communications Act was modeled, the tariff indisputably does override the contract to assure uniform treatment to all users. *Armour Packing Co.* v. *United States,* 209 U.S. 56 (1908). The lower court's failure to follow *Armour* clearly warrants review.

In short, this case is a classic example of one warranting certiorari under established principles. The issues bear upon the operation of the switched telephone network and have great practical importance; there are manifest conflicts between the decision below and principles established by this Court and by other courts of appeals; and the issues raised are unquestionably recurring ones in the administrative process.

**II. The Evidentiary Hearing Issue Presents a Recurring Question of Administrative Law on Which the Circuits Are Divided.**

AT&T contended below and in its petition here (pp. 18-25) that it was entitled to an evidentiary proceeding in which facts could be tested and weighed before FX-CCSA physical connection was ordered. It showed that this course was required not only by statutory language and past administrative practice but by the more basic principle, followed by other courts of appeals, that an agency taking far-reaching measures in-

volving complex and factually related issues must accept and evaluate evidence, however the proceeding may be denominated.

The Government's first response is to contend that the FCC's decision below involved nothing more than the "interpretation" of an earlier administrative order so that the case was necessarily concluded when the "legal" question of interpretation was resolved. Gov. Br. 11-12. This is manifestly an inaccurate description of what the FCC did and said in this case. The FCC's own decision shows that it here purported to consider —or, as it alleges, reconsider—whether FX-CCSA physical connection should be ordered, and it resolved that question on the merits contrary to the Bell System—although without affording any opportunity to introduce, weigh or test evidence bearing on this issue.

Thus, the FCC stated that "[i]n this proceeding, therefore, we are again reviewing the question of interconnection." Pet. App. 26b. It stated that in this case it was giving "careful consideration" to the arguments for and against FX-CCSA physical connection and had reached the view that its objective "requires the issuance of broad interconnection orders." *Id.* The FCC decision then devoted paragraphs of discussion, without any evidentiary foundation, to the technical and operational considerations raised by FX-CCSA physical connection. *Id.* at 26b-31b.

Consequently, there is no question that the FCC did purport to consider and resolve in this proceeding the issue of FX-CCSA physical connection. Although it sought to draw support from its earlier general statements in the *Specialized Carrier* case, much of its present decision would be wastepaper if it were—as

the Government's brief now asserts—merely an interpretation of a prior order.[1] Having purported to determine (and/or redetermine) the issue of FX-CCSA physical connection on the merits in this case, the FCC's order must be justified in terms of what it actually said and the procedures it actually employed. *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943).

The Government's second contention is that under *United States* v. *Florida East Coast Ry.*, 410 U.S. 224 (1973), the Commission is entitled to use rulemaking to require physical connection without conducting an evidentiary hearing. Gov. Br. 13. See also MCI Br. 19, SP Br. 9. This argument ignores both the statutory language authorizing physical connection "orders" and the evident fact that, even if rulemaking were permitted, the FCC here proceeded through an adjudicatory show-cause proceeding and not through rulemaking. See AT&T Pet. 19-23.[2] Much more important, whatever label proceedings may be given, *Florida*

---

[1] The "prior order" argument is additionally defective because in the prior proceeding the FCC did not issue any interconnection order to AT&T, even to provide loop service (see 29 F.C.C. 2d at 938-41), which involves no physical connection with the switched network (18 F.C.C. 2d at 953-54 (quoted AT&T Pet. 6)). How the FCC's present proceeding could have confined itself merely to the "interpretation" of an interconnection order never previously issued is a point the Government's brief does not explain.

[2] The statute involved in *Florida East Coast* expressly provided for rulemaking (410 U.S. at 225), whereas Section 201(a) of the Communications Act contemplates "orders . . . in cases" requiring physical connections between carriers based upon findings that such action is "necessary or desirable in the public interest." The legislative background of Section 201(a) (AT&T Br. 20) and the FCC's own prior construction (*id.* at 21) support the view that adjudicative orders and not rules were the intended means of requiring physical connections.

*East Coast* does not authorize an agency even in avowed rulemaking proceedings to ignore evidence and resolve factually related issues in ignorance of the facts; and the lower court's misconstruction of that decision (Pet. App. 32a) itself reinforces the need for review.

*Florida East Coast* involved not only an explicit determination by Congress to authorize rulemaking but an agency proceeding in which evidentiary *data* was in fact accepted from the parties before a decision was reached. 410 U.S. at 231. That case in no way involved a complete refusal of an agency to receive evidence and cannot support the FCC's action in this case. What the Government fails to note is that the actual issue in *Florida East Coast* was simply whether submissions could be confined to written presentations (410 U.S. at 226)—a form in which the ICC frequently accepts evidence even in adjudicatory proceedings (see 49 C.F.R. § 1100.51)—or whether oral hearings were also necessary.

Rulemaking, even where authorized, may permit the agency to simplify the form of submitting evidence, curtail oral cross-examination, and avoid confining itself solely to record evidence, but it does not mean (as the Government seems to assume) that the agency can simply refuse to accept evidence altogether. Where rulemaking proceedings have presented factual issues within the experience and knowledge of the parties, acceptance and evaluation of evidence is integral to rulemaking proceedings.[8] Other courts of appeals—

---

[8] Thus, the Administrative Procedure Act itself contemplates the receipt of "data" as well as "arguments" in "informal rulemaking" (5 U.S.C. § 553(c)) and, in "formal rulemaking," the APA

which the lower court in its own words "decline[d] to follow" (503 F.2d at 1264-66 (Pet. App. 28a-32a))—have repeatedly held evidentiary proceedings to be required in rulemaking where important issues were at stake and factual questions were presented. AT&T Br. 24-25.

*American Airlines, Inc.* v. *CAB*, 359 F.2d 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966), heavily emphasized by the Government (Gov. Br. 14-15), is an unfortunate decision from the Government's standpoint. There, in rejecting a demand for oral proceedings, the majority emphasized that the agency had accepted "written data" (359 F.2d at 626) and "rebuttal" (*id.*), and it noted that the petitioners seeking even more elaborate oral hearings had made no "specific proffer" of the subjects requiring such proceedings. *Id.* at 633. Compare pp. 1a-11a, below. Moreover, the court took special care to say that the agency action involved was not one which was "individual in impact"—as the present order clearly is—so that a claim of rulemaking would be only a masquerade. *Id.* at 631.[4]

---

provides for the conventional submission of "evidence" in oral or documentary form including rebuttal and cross-examination except that (where prejudice will not result) the agency may provide for the submission of all or part of the "evidence" in written form. 5 U.S.C. § 556(d). The FCC is constantly receiving evidentiary data in rulemaking proceedings. *E.g.*, the computer rulemaking proceeding which, in response to highly factual notices of inquiry (7 F.C.C. 2d 11, 19), resulted in 3,000 pages of comments from sixty parties and numerous reports by a consultant firm (28 F.C.C. 2d at 291-92). See generally *GTE Service Corp.* v. *FCC*, 474 F.2d 724 (2d Cir. 1973).

[4] Even with these qualifications, the *American Airlines* decision represented a 4-3 *en banc* decision in which the three dissenters contended that the procedures were inadequate.

The last contention made by the Government to defeat AT&T's claim to an evidentiary proceeding is the claim that AT&T made no showing or proffer warranting a factual inquiry. Gov. Br. 13-15. In fact, the record clearly shows that AT&T submitted a lengthy description of the factual issues requiring examination and of pertinent facts it intended to prove in an evidentiary hearing (A. 224-33, 261-65). This was a specification vastly more detailed than the "issues" the FCC has itself described as warranting an evidentiary hearing in prior physical connection cases. AT&T Pet. 20. To resolve any further dispute on this point, the AT&T proffer and technical annex are reprinted at p. 1a *et seq.* of this reply.

The Government's argument that no showing of need was made not only ignores the detailed proffer but omits the circumstances in which it was considered. In denying AT&T's initial request for an evidentiary proceeding, the FCC asserted that it was "premature" (45 F.C.C. 2d at 262), and then turned about and issued a decision which discussed the very same issues of fact and resolved them against AT&T without ever receiving evidence on these now matured issues. Pet. App. 26b-31b. The very fact that the FCC's decision devotes paragraphs (*id.*) to discussing the allegedly non-existent operational and economic issues is the best evidence of all that these issues were very real indeed.

Even in this Court the Government's own brief finds it necessary, in explaining the FCC's result, to make factual arguments or assumptions on which AT&T specifically sought an opportunity to introduce contrary evidence. Thus, the Government asserts (pp. 14-15) that past experience with local telephone company

physical connection arrangements appears to have resulted in no problems and that the specialized carriers have "every incentive" to avoid any action that would jeopardize the technical efficiency of the switched network. Yet, AT&T specifically sought an opportunity to submit evidence on this very issue to show that existing arrangements were quite different and that specialized carriers had substantial incentives to operate in ways that would jeopardize the switched network. See pp. 3a-6a, 9a-11a, below.

**III. The Lack of Fair Notice Raises a Basic Issue Respecting the Scope and Rationale of Morgan v. United States, 304 U.S. 1 (1938).**

AT&T showed in its petition (pp. 26-32) that however the *Specialized Carrier* decision might now be read, at the time of that proceeding the fair notice required by *Morgan* was not given that the proceeding involved FX-CCSA or any other type of physical connection with the switched network. AT&T relied *inter alia* on the absence of any discussion of this subject in either the notice or decision in that earlier proceeding; on MCI's own pronouncements in the *Specialized Carrier* case that switched network connection was not sought; on the Government's own similar representation to the Ninth Circuit on review of the FCC's decision; and on the Third Circuit's own earlier conclusion that the decision was at the very least unclear.

The Government's first response seems to be that AT&T is arguing in whole or in part that the FCC has, in the present case, merely misinterpreted its prior decision. Gov. Br. 16-19. The Government then argues that the FCC's interpretation was a permissible one and was not strictly forbidden either by the absence

of any explicit discussion of FX-CCSA physical connection in the *Specialized Carrier* decision or by the affirmative representations in the proceeding and afterwards that switched network physical connection was not involved. The Government's response, like that of the lower court, simply fails to meet the argument that fair notice was not provided.

The Government appears to assume that AT&T's claim is answered so long as the agency's present interpretation of its earlier order is a permissible one in some abstract sense. The assumption is plainly wrong. The subsequent reinterpretation of the decision, even if it is otherwise within the bounds of agency power (which AT&T disputes), does not cure or even address an asserted deficiency in providing notice at the time the proceedings were originally held and the decision rendered. The very rationale of *Morgan* is to protect the right of a party "to be fairly advised of what the Government proposes" so that it may "be heard" in opposition "*before* [the Government] issues its final command." 304 U.S. at 18-19 (emphasis added).[8]

The Government's misconstruction of *Morgan* parallels that of the lower court in this case, which also

[8] It is the absence of any such notice that makes it ludicrous for MCI to assert in its opposition (pp. 7-10, 28) that AT&T was provided an opportunity to submit evidence in the *Specialized Carrier* case bearing on FX-CCSA connection and that AT&T failed to take advantage of this opportunity. Of course, there was no submission of evidence on this issue: AT&T never knew the subject was in issue, and MCI—which advised the FCC in that proceeding that "no switching between customers is involved" in its proposal (Comments of MCI Carriers, October 1, 1970, pp. 26-27, 102-03, 167-68)—is the last party in the world who should be heard to argue otherwise.

addressed itself to the issue of permissible interpretation but *not* to the issue of notice. AT&T Pet. 31. This misconstruction of *Morgan* presents a basic question concerning the scope and rationale of this Court's decision in that case; and the approach of the Government and lower court is inconsistent not only with *Morgan* but with the decisions of other circuits correctly applying its principle. AT&T Pet. 26, 30. The conflict is clearly a proper issue for certiorari.

The Government is no more persuasive in seeking to explain away the evidence on which AT&T relied to show that no fair notice was provided at the time of the *Specialized Carrier* decision. First, the Government brief simply fails to address the complete lack of any reference in that decision to FX-CCSA or any other type of physical connection with the switched network. Rather, the brief seeks to imply (pp. 3, 16) that FX-CCSA are merely minor variations on point-to-point private line service (and loop interconnection) which were in fact the actual objects of the specialized carriers' applications and the focus of the *Specialized Carrier* decision. The reality is that FX and CCSA are distinct hybrid services that, quite unlike point-to-point private line service, indisputably involve physical connection with the switched network.[6]

---

[6] Ironically, in attempting to distinguish between the ordinary "public telephone system" and "private line service," the Government's brief (p. 3) provides a description or definition of the public telephone system in a way that—accurately but quite contrary to the Government's purpose—emphasizes the relationship between the switched network and FX and CCSA service. Thus, it describes the public telephone system, in contradistinction to private line service, as one which allows a subscriber to reach any other subscriber over a circuit established for the purpose of the call. This is *exactly* what FX service does (Gov. Br. 3 n.1); and CCSA is scarcely less related to the public telephone system since it utilizes

Next, referring to MCI's statements in the *Specialized Carrier* case disclaiming any intent to connect into the switched network, the Government's brief (p. 17) blandly asserts that the agency and not MCI defines the scope and terms of an FCC proceeding. What this ignores is that the *Specialized Carrier* proceeding was brought to consider the applications of specialized carriers as *they* defined their proposals. See 29 F.C.C.2d at 871-72. MCI was not only the principal applicant but, with one distinct and irrelevant exception, MCI was the very prototype of the specialized carrier applicants, and the FCC's decision both described and treated it in this manner. See *id.* at 874-76.

Then, the Government's brief (pp. 17-18) turns to the explicit representation of both the United States and the FCC in the Ninth Circuit that the applicants involved in the *Specialized Carrier* case "made clear that their facilities would not be connected with the interstate telephone network of AT&T . . ." (quoted at AT&T Pet. 10 and Pet. App. 1f). The Government explains this as an inadvertent mistake in a case where the petitioners "did not raise any interconnection issue." Gov. Br. 18. In fact, the representation—which was made at least twice in the Government's brief in the Ninth Circuit (Pet. App. 1f-2f)—was apparently a conscious response designed to assuage doubts the Ninth Circuit might otherwise have had about the failure of the FCC to provide more extensive proceedings to evaluate the possible adverse impact of the policies adopted in the *Specialized Carrier* decision.[7]

---

common switching systems to provide CCSA interconnection. See AT&T Br. 9.

[7] The comparative spontaneity and the contemporaneous nature of the Government's representations in the Ninth Circuit reinforce

Finally, the Government asserts (p. 19) that there is no inconsistency between the Third Circuit's present reading of the *Specialized Carrier* decision and its earlier holding that, with respect to FX-CCSA physical connection, the scope of any such obligation under the *Specialized Carrier* decision was "so unclear" and involved such "uncertainty" and was so subject to "legitimate dispute" that the District Court's injunction had to be vacated. 496 F.2d at 221-24.[8] This is a repetition of the Government's basic misinterpretation of *Morgan*. The very fact that the FCC's earlier proceeding was (euphemistically) "unclear" as to whether it embraced FX-CCSA physical connection—and was unclear before, during and well after the decision—effectively refutes the suggestion that AT&T was given the fair warning required by *Morgan* that the FCC proposed to consider that important issue in that case.

What is conclusive evidence of this lack of fair notice is the utter absence of *any* direct discussion in the *Specialized Carrier* notice or decision of FX-CCSA physical connection or any other form of physical connection with the switched network. If switched net-

---

their accuracy and make them far better reflections of what the *Specialized Carrier* decision actually determined than the involuted and painful explanation of that decision offered in the proceeding below.

[8] Similarly, the FCC itself conceded below, with extreme understatement, that its earlier decision "may not have been perfectly clear." Pet. App. 26b. The Government made the same concession in somewhat stronger terms to the Second Circuit in explaining that the FCC might conclude in the proceeding below that it had never addressed the issue of FX-CCSA physical connection in the *Specialized Carrier* case. AT&T Pet. 28.

work physical connection had in fact been an issue in that proceeding, it is inconceivable that every key document including the FCC's notice, the comments of the various parties including AT&T and MCI, and the briefs in the subsequent proceeding in the Ninth Circuit appeal—would have completely failed even to mention the issue.[9] The lack of any such specific discussion is, of course, consistent with the prior and subsequent affirmative representations by MCI and the FCC that switched network physical connection was not an issue.

**IV. The Summary Tariff Rejection Conflicts with Decisions Both of This Court and of the Court of Appeals for the Fourth Circuit.**

AT&T's petition (pp. 32-37) showed that under the Interstate Commerce Act it is well-established that a tariff filing overrides a prior inconsistent contract.[10] Under the Natural Gas Act, which "is in marked contrast to the Interstate Commerce Act," such tariff filings do not supersede preexisting contracts. *United Gas Co.* v. *Mobile Gas Corp.*, 350 U.S. 332, 338 (1956). The third question warranting review here is whether

---

[9] After what was undoubtedly the most diligent inquiry, the main scrap of evidence that has been adduced by the FCC to show that it did contemplate FX-CCSA physical connection is a brief and general *financial* computation in the *Specialized Carrier* case. Gov. Br. 16. The sentence in question does not refer either to FX-CCSA service or to physical connection with the switched network. Moreover, an examination of the sentence in context shows that the FCC was not addressing or contemplating FX-CCSA physical connection but was simply making the general point that most of AT&T's revenues derive from MTS and WATS service. Pet. App. 38a.

[10] *Armour Packing Co.* v. *United States*, 209 U.S. 56 (1908); *Cincinnati, N.O. & T.P. Ry.* v. *Chesapeake & O. Ry.*, 441 F.2d 483 (4th Cir. 1971); *Cruces Cable Co.*, 35 F.C.C. 2d 707, 708 (1972), *reconsideration denied*, 39 F.C.C. 2d 552, 554 (1973).

the lower court improperly disregarded the former line of authority and adopted the latter as the rule presently and hereafter to be followed in construing the Communications Act.

The Government's brief manages to avoid any reference to the overwhelming legal authority showing that the Interstate Commerce Act precedents are presumptively applicable to the Communications Act. The legislative history shows that the Communications Act was modeled directly on the Interstate Commerce Act; the two statutes have repeatedly been construed *in pari materia;* the rate and tariff provisions of the two statutes are virtually the same and both contrast with the provisions of the Natural Gas Act respecting contract-made rates; and the FCC itself recognized in the *Cruces Cable* case that the *Armour* doctrine applied to filings under the Communications Act. AT&T Pet. 33-35.[11]

Instead, the Government contends (p. 21) that the Communications Act parallels the Natural Gas Act, and is subject to its precedents, because both allow rates either "by contract or by tariff." This in no way distinguishes the Interstate Commerce Act: this Court in *Armour* did not suggest that there was anything un-

---

[11] While the Government ignores *Cruces Cable,* Western Union's brief (p. 12) argues that the decision is distinguishable because the contract there involved contemplated that the tariff rate changes would automatically revise the contract rate. However, the FCC there stated, without qualification, citing *Armour,* that "it is well established that a carrier may unilaterally terminate a contract rate by publishing a tariff for a higher rate than that provided for in the contract." 35 F.C.C. 2d at 708. It then went on to state, simply as an alternative ground, that the contract "at least indicate[d]" that the complainant was aware that the rate was governed by the tariffs, not the contract, in the event of a change in tariff rates. *Id.*

lawful or impermissible about a contract establishing a rail transportation rate and, indeed, the Interstate Commerce Act, like the Communications Act, specifically provides for the filing of intercarrier contracts, in order to advise the agency of their existence. AT&T Pet. 36. As *Armour* made clear, its rationale was not that the making of the contract was unlawful but rather that the tariff change has priority over the contract in order to assure that tariffs will apply equally to all parties where a tariffed service is provided. 209 U.S. at 81-82.

The Government's statement that rates may be established by contract or tariff under both the Communications Act and the Natural Gas Act not only fails to distinguish the Interstate Commerce Act and *Armour* but it ignores the central distinction between the two former statutes bearing on the issue here involved. Under the Natural Gas Act, the critical rate provisions —suspension, substantive review of rates under the justness and reasonableness standard, and repayment of excessive rates—apply both to contract rates and to tariff rates. Under the Interstate Commerce Act and the Communications Act, only tariff-made rates are subject to these provisions, and it is thus the tariff rates which are the basic (and overriding) form of ratemaking mandated by both statutes.

The lower court's decision conflicts not only with *Armour* but with the *Cincinnati* case in which the Fourth Circuit recently applied *Armour* to an intercarrier contract under the Interstate Commerce Act. Devising a new ground to distinguish the Fourth Circuit decision (which understandably did not occur to the lower court), the Government now argues (p. 22) that the *Cincinnati* case is "entirely consistent" be-

cause "the Fourth Circuit concluded that the service in question was one which must be provided under a tariff." Since the FCC here *directed* AT&T to tariff its physical connection arrangements with other carriers and that directive led to the filing of the very tariffs here involved,[12] the Government's argument serves to confirm—rather than to distinguish—the application of the *Armour-Cincinnati* doctrine in the present case.

Western Union's brief largely parallels the Government's but adds the novel suggestion (pp. 18-19) that the FCC's summary rejection of the tariffs might be upheld on an entirely different ground having nothing to do with the inconsistency between the tariffs and the prior contracts. The ground was adopted neither by the Third Circuit, as Western Union admits (p. 19), nor by the FCC, contrary to Western Union's intimation.[13] Under these circumstances, Western Union's alternative contention—which is not even mentioned in the Government's brief—clearly does not impede review on certiorari of the ground actually adopted by the FCC and the lower court.

Western Union also asserts (pp. 8-9) that it will be disadvantaged if the tariffs are applied to it and it must obtain facilities on the same basis and rates

[12] The directive occurred in the FCC's letter of October 4, 1973, described at AT&T Pet. 15-16 and quoted in pertinent part by the FCC itself at Pet. App. 21b.

[13] The FCC asserted in its decision (Pet. App. 34b) that Section 214(a), 47 U.S.C. § 214(a), among other statutory provisions, supported its *jurisdiction* to review claims respecting the Western Union contracts; but it based its rejection of the tariffs on the express ground that they were inconsistent with the pre-existing contracts. Pet. App. 35b-40b.

as the specialized carriers. What it ignores is that, if the tariff provisions do apply to it equally with other carriers, it is entitled to have the tariffed services provided at just and reasonable rates, terms and conditions, and there is a range of statutory remedies to assure that it receives this treatment. See Sections 201-05 of the Act. Western Union's *ad hoc* arguments in this vein are no different than those made by the shipper in the *Armour* case for maintaining the existing contracts, arguments which this Court firmly rejected as inconsistent with the statutory plan. 209 U.S. at 81-82.

Finally, Western Union (p. 19), joined by Southern Pacific (p. 11), endeavors to suggest that the legal issues presented by the tariff rejection are somehow less significant because the contracts involved are likely to expire in three more years. The fact is that there are literally dozens of intercarrier agreements made by carriers providing telecommunications services; and the FCC's drive toward requiring the tariffing of intercarrier arrangements (AT&T Pet. 15-16) assures that the issue raised here will be a recurring one. Thus, the present case, even apart from its own importance, is an apt occasion for resolving the dispute whether in such situations the *Armour-Cincinnati* or the *Mobile* line of authority governs under the Communications Act.

## CONCLUSION

For the reasons stated above and in the petition, the petition for certiorari should be granted.

Respectfully submitted,

CHARLES A. HORSKY
MICHAEL BOUDIN
E. EDWARD BRUCE
888 Sixteenth Street, N.W.
Washington, D. C. 20006

CHARLES RYAN
HAROLD S. LEVY
195 Broadway
New York, New York 10007

*Attorneys for Petitioners*

*Of Counsel:*

F. MARK GARLINGHOUSE
195 Broadway
New York, New York 10007

June 1975

# APPENDIX

## APPENDIX

**Excerpts (paras. 32-41 and Attachment A) from Bell System Brief, January 21, 1974, submitted in FCC Docket No. 19896.**

B. *Interconnection as Urged by MCI Would Result in Serious Technical, Operational and Economic Harm to the Public*

32. If the interconnection of services being sought by MCI is required, there will ensue a number of serious technical, operational and economic consequences. These consequences will impact upon the quality of the interstate network and ultimately upon the service and rates to the telephone-using public. In view of the serious nature of these consequences, and in view of the requirements of § 201(a), it is incumbent that there be a full evidentiary hearing so that the Commission may have sufficient information by which to make a reasoned judgment on the question of whether the interconnection being urged by MCI is in the public interest. As stated in the Petition filed herein by the Bell System companies, dated January 11, 1974, some of the factual issues associated with the urged connection which require consideration on an evidentiary record are as follows:

(a) The extent to which physical connection with MCI would involve direct connection into the central offices of the Bell System companies and remove insulation of the network from operations in the MCI system which may be defective.

(b) The extent to which such physical connection would involve specialized carriers in the network management function of the telephone companies and the effects on the telephone-using public.

(c) The effect of such physical connection as requiring specialized planning, engineering and circuit design, as well as controlled implementation, seg-

mented operation, divided maintenance responsibility and complex administrative procedures.

(d) Whether such physical connection would cause technical problems in sectionalizing trouble and initiating remedial steps for outages, thus causing a commitment of substantial resources for manpower, hardware and test equipment not currently required for existing FX and CCSA service provided by AT&T with its connecting, concurring and other participating carriers.

(e) The possible disruption of planning by the Bell System Companies for continuity of telephone network services, which encompass facility restoration over paralleling routes, portable units to replace microwave stations and towers demolished by disaster, redundancy of critical equipment units and the application of important network management techniques to maintain service performance during impaired service conditions.

(f) Creation of major problems such as potential degradation of service to Bell System customers; added costs of manpower, training, and test equipment; and other problems arising from the provision of physical connections as now sought by the specialized carriers.

(g) The detrimental effect on network planning, which planning requires engineering, economic and operational rules and procedures for managing complex networks.

(h) The extent to which proposals for physical connection with MCI would involve MCI in through services with the Bell System companies and the consequences of such arrangements.

(i) The economic penalty which would be imposed on the users of services of the Bell System by diver-

sion of services such as CCSA and FX from Bell System companies to other carriers and resultant further cross-elastic effect and division of MTS revenues.

(j) The cost to the public that would result from the inefficiencies and operational problems of granting other carriers additional types of interconnection, such as for CCSA and FX.

These issues have not been heard, much less resolved, and at the required evidentiary hearing the Bell System companies would be prepared to present evidence along the lines of the discussion which follows, to demonstrate that the proposed connections are not in the public interest.

33. The Bell System companies are prepared to demonstrate that the Bell switched interstate network is a highly complex single entity composed of thousands of facilities and switches and millions of terminal devices, all interacting so that the entire system works as a whole, and not as an assembly of parts. Over many decades, the Bell Companies have developed a vast body of engineering and operating procedures that make it possible to engineer and operate this nationwide network as a joint enterprise. As a consequence, there exists presently a vast and smoothly working nationwide switched telecommunications system which is unequaled anywhere in the world.

34. At the present time, it is the responsibility of the Bell System to plan, engineer, maintain and operate this interstate network and to insure that all portions are adequately engineered and sized to provide swift, efficient and reliable end-to-end service at reasonable rates to the users.* The combining of transmission facilities and

* There are differences in Bell's providing interstate services jointly with independent telephone companies as contrasted with interconnection with MCI. The Bell System associated companies have extensive responsibility for planning and work closely with each of the independents in developing and implementing uniform

switching machines provided in part by the Bell System companies and in part by MCI and possibly a number of other suppliers into an effective, smooth-functioning, low-cost telecommunications network would be economically and practicably unobtainable. The technical and administrative problems in sectionalizing trouble and initiating remedial steps in a fragmented network would require the Bell System companies to commit substantial resources for manpower, hardware and test equipment not currently required for providing existing services, including FX and CCSA services. With divided control and disjointed responsibility for overall FX and CCSA services, special testing and maintenance procedures would be required to work at a number of interfaces with MCI, and perhaps many other carriers. Detailed data regarding harm and the required remedial efforts would be developed at an evidentiary hearing.

35. In addition, the Bell System companies would demonstrate that facility failures on the MCI-provided portion of the network could seriously impact the service of Bell CCSA and FX customers and of the public message network users. Failure of MCI provided services could create congestion on the telecommunications network as users attempted to reach locations beyond the point of failure. This results from the fact that message network users share switching and common control equipment with FX and CCSA users at a number of locations. Such sharing is an efficient and economical way to handle services of these types under normal operating conditions. Network dynamics, however, dictate prompt, remedial ac-

---

engineering and operating standards. The independents generally concur in AT&T tariffs and are parties to agreements with Bell by which revenues are shared in accordance with the costs incurred. In this respect they are participants with Bell in the joint operation, and are partners with the Bell Companies, not competitors. Joint arrangements work satisfactorily among partners, but not among competitors.

tion when equilibrium is disturbed. This factor is inherent in Bell planning for continuity of network services, which encompasses facility restoration over paralleling routes, portable van-mounted units for completely replacing demolished microwave stations and towers, redundancy of critical equipment units and the application of sophisticated network management techniques for minimizing impact and maximizing performance during impaired service conditions. Since MCI does not have the capability to provide restoration, a failure of an MCI-provided facility which had been introduced into the middle of this dynamic complex, followed by a failure of that facility, could have a devastating effect on the service of customers who have nothing in common with MCI customers except the sharing of switching and common control equipment. Segmented provision of the network could, in addition, be a deterrent to technical and operating innovations. Employment of rapidly developing technology to effect improvements benefiting all FX and CCSA customers could be impeded by either the inability or the unwillingness of some suppliers to make concurrent capital expenditures in the portions of the network provided by them.

36. The technical and operation harm to the interstate network, resulting from the participation by MCI in the provision of FX and CCSA services would, in turn, result in significant and serious economic harm to the Bell System companies and their customers.* Much added expense would be incurred in combating the operational deficiencies described above, as well as from the additional engineering and construction efforts required to meet the needs of MCI and to make the services function properly on an end-to-end basis.

37. While it is difficult to quantify with particularity the economic impact associated with the technical and

* Additional examples of technical and operational harm from the connections proposed by MCI are shown in Attachment A hereto.

operational detriments which would be caused by MCI, costs would be substantial and would continue so long as the proposed connection were required. The Bell System network is, as has previously been discussed, jointly planned, engineered and operated so as to provide all services on an end-to-end basis. This requires a joint effort of all of the companies in predicting traffic, planning facilities, engineering the services, and constructing the network. Usually, this is done several years in advance of providing service. This is a time-consuming and complex effort. The Bell System companies' evidence will demonstrate that with MCI participating in the provision of services, such as FX and CCSA, the Bell System would be required to expend additional engineering effort to make the services function properly on an end-to-end basis, being hampered by the lack of adequate information and nonstandardized equipment. This in turn raises the question of how the Bell System companies would be compensated for the additional engineering expense incurred on behalf of MCI. Certainly there is no evidence before the Commission to resolve such questions.

38. In addition, the Bell System companies test one another's facilities and are reimbursed through the Division of Revenues procedure for the efforts in behalf of the partnership. The evidentiary showing will demonstrate that this is neither practical nor contemplated in any interconnection with MCI, and MCI does not propose to want such joint operation. Thus, it will be necessary for each carrier to test and operate its own facility; yet, such a segmented arrangement cannot work with divided responsibility. We know of no way that MCI can test the service it will provide without disrupting Bell System services or involving Bell System manpower and test equipment at the interface and quite possibly in the MTS network. The resulting costs would be large.

39. The evidentiary showing would also indicate that technical information and procedures would be required

which would specify such parameters as transmission levels, noise limits, bandwidth, protective criteria, and signaling arrangements for the various facility segments involved. The documentation of such procedures could not be prepared before agreement was reached concerning which carrier would provide each unit of equipment. Also, operating procedures would be required which would delineate the procedures by which operational tests would be conducted through the interconnection segments and the responsibilities of each carrier involved. Administrative procedures would be required to describe the procedures by which each company would start, rearrange and disconnect services; they would also be needed to specify how and where forecasts of requirements could be made. The expense involved in reaching and implementing these procedures would be large. We would, of course, be prepared to make a complete showing of this economic effect at the evidentiary hearing.

40. At a hearing, moreover, evidence would be provided to show that there would be significant market diversions from the Bell FX and CCSA services as well as the MTS and WATS services, if the proposed interconnection is required, resulting in lost revenues and idle facilities. This economic harm will necessarily be reflected in higher rates to all Bell System customers. The Commission must, therefore, resolve such issues in order to determine whether the requested interconnection and the resultant economic harm is in the public interest—not just in the interest of MCI.

41. Thus, if the connections for FX and CCSA now sought by MCI were to be required, serious operational, technical and economic effects would ensue. The result would be added cost to the public in substantial amounts. Such connections should not be required. In any event, an evidentiary hearing under § 201(a) is required to explore these facts thoroughly before any such connection may be ordered.

## ATTACHMENT A

### Some Specific Examples of Technical and Operational Harm Which Would Result from Connections Proposed by MCI

If MCI were to provide a portion of Bell System FX and CCSA services, serious technical and operational problems would result. These problems would result in disruption and degradation of these services and would cause additional costs and expense which must be borne by all users of the interstate network. A discussion of some specific problems follows.

FX service is a combination of switched local exchange telephone service and a private line interexchange channel which allows a customer physically present in one exchange to have subscriber local exchange service in a distant exchange. FX service in not, however, point-to-point private line service. Rather, it is a direct connection into the switched message telecommunications network, and therefore, is inextricably bound into and will directly impact upon the operation of the MTS service.

CCSA, similarly, is a switched private line service designed for those users having communications requirements large enough so that it is economical for them to have their own private switched networks. It employs common control central office switching machines to interconnect and switch private line circuits. This switched network consists of a substantial number of switches, access lines from customer premises to these switches, and trunks connecting the switches together. Although the private line circuits furnished in CCSA are provided for the exclusive use of the CCSA customer, the switching machines are shared with MTS, WATS and other private line customers and therefore CCSA service has an equally important potential for impacting on the operation of the MTS service as FX service.

If the FX and CCSA services are to operate properly, each must be maintained and operated as one system under a single set of standards. Standardization of signaling, operational and transmission parameters is important in a common user network because of the millions of possible combinations of circuits that will be regularly linked together to provide an end-to-end communications path. However, MCI has stated that it will not provide a joint service. With the introduction of MCI's separately devised standards in the network, impairments will affect all users of the service. Technical parameters such as frequency response, line balance, level equalization, delay equalization and noise must be standardized and controlled in order to prevent these problems. Signaling incompatibilities would result in service impairment to MCI's customers. These incompatibilities can cause mutilated digits and timing errors, which would affect the commonly used switching machine and possibly deny serice to other users.

The procedures for operating and testing a Bell System FX or CCSA service are quite different from those required by the MCI interconnection. The Bell System companies test one another's facilities and are reimbursed through the Division of Revenues procedure for the efforts on behalf of the partnership. This is neither practical nor contemplated by MCI in its proposed interconnection. Since MCI may utilize different maintenance objectives, overall tests—which evaluate distortions introduced by both carriers' facilities—will not be meaningful. For example, although each carrier's facility may meet the respective carrier's design and maintenance objectives the overall test result may not meet necessary standards for satisfactory nationwide network performance. Accordingly, MCI will cause either poor performance or wasteful operational effort and expense.

Even with duplicative testing and maintenance efforts, serious harm may still result by reason of MCI's partici-

pation in the provision of these services. When a facility route fails, its circuits initiate switch operations similar to simultaneous call attempts to the machine. This would tie up all of the common equipment in an average sized switching office. This would, in turn, prevent customers from completing calls through the switching machine. A natural reaction of these customers would be to try to call again. This would in turn cause more ineffective attempts to complete the call. Any telephone user in any part of the United States who was trying to complete a call which routed through the impacted switching machine would not complete the call. A snowballing effect would take place—by the frustrated customers trying to complete their calls again and again—pouring more and more attempts into the machine. This would completely tie up the machine. When this happens, the machine fails to switch any calls, due to the busy common control equipment. Thus, the failure of an MCI facility where there is no possibility of prompt restoral on alternate routes could adversely affect the service of customers who have nothing in common with MCI customers except that they share a switch and common control equipment. Ultimately, this might require the installation of additional switching capacity at considerable cost to the public.

Divided provision of the network facilities could also be a serious deterrent to technical and operating innovations as a result of the inability or the unwillingness of MCI or other specialized carriers to make concurrent capital expenditures in the portions of the network provided by them. For example, the major switching technology used today for CCSA is based upon electro-mechanical devices and expansion of CCSA features is therefore somewhat limited. In order to meet the needs of the future, the Bell System plans to convert to Electronic Switching System technology. Implementation of the Bell System No. 4E Electronic Switching System (ESS) is expected within a few years. This will be a high capacity switch capable of

serving MTS and specialized services. Along with the new switching system, it is planned to introduce a Common Channel Inter-Office Signaling system that will use separate data channels for high speed signaling and improved network control. These innovations may be denied to CCSA customers if the CCSA networks are provided by a number of carriers each motivated by its own interests and not working toward the same goals.